



**RIGA
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Protection of Copyright in E-commerce within the European Union.

Analysis of legal issues with respect to download of musical works.

BACHELOR THESIS

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DECLARATION OF HONOUR:

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed)

RIGA, 2019

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Abstract

Stricter and better - defined protection mechanism for copyright issues as well as adaptation and harmonization of the national and community jurisdiction to the changes became a necessity because of proceeding rapid technological development and its increased importance in community trade as it became a major reason for negative tendency in the functioning of the Internal Market. Doctrinal research method will be mostly used in a process of thesis development because the nature of enforcement of the copyright concerning activity online as it currently lays down within its legislative framework, outcoming case-law and its interpretation. Scope of the analysis will remain within the European Union countries and its jurisdiction. Results showed correlation between development of the digital environment and increased frequency of cases on copyright abuse providing that unlawful download of a musical works remains one of the most commonly infringed type of Intellectual Property.

Research Questions:

Does the development of e-commerce still increases number of copyright infringement cases and whether the further harmonisation of the EU legal norms is needed?

What legal issues can face downloading of a copyrighted music and what would be an impact of it on author's rights?

Summary:

E-commerce in modern world can obtain any form of business transactions where interaction of the parties is carried out in the electronic platform instead of physical exchange or direct physical contact and as a result of which the right to use a goods or service is transferred from one person to another. There are different types of the organization of electronic commerce: national and international. For a number of reasons at the international level electronic commerce becomes more complicated and faces certain issues. In order to perform the way of trade where physical contact is not needed, especially concerning outcome of persons creativity, which are protected by copyrights it is necessary to obtain a permission from original author in order to avoid any legal consequences.

This research paper was aimed on to analyze legal issues of an online business activities concerned with protection of its intellectual property in the Internet, focusing on aspects of copyright protection in activity involving download of musical works. The research included examination of the elements of unauthorized use of copyright in digital environment as well as focuses on determining legal basis for authors to avoid infringements of their intellectual property. More narrowly has been analyzed current legal framework regarding download of a musical content and its impact on author's rights. In order to make such analysis it was also expected to discover reasons for rapid increase in the use of Internet in business activities. In the process has develop an understanding of the existing exceptions and limitation as well as investigate the need for further harmonization of legal norms within the European Union. Legislative framework of several European countries was analyzed as well as relevant cases in order to make a conclusions and answer the research questions.

Expectations to determine an impact of high speed developing nature of digital environment on copyright issues showed its negative effect because of the increased number of infringement case due to greater and easier access to available online content and information.

Introduction:

The 21st century is a century of information and technologies. Society can observe daily outflow and inflow of information from different sources and use it in their businesses and everyday life. It is not a secret that nowadays the main and most global source of information is the Internet. Without any doubt it is a huge platform where everything starting from fashion articles and ending with serious lawsuits can be found and observed. Within several clicks of a mouse almost any information can be collected and used as a subject of a personal use. However, people often forget that even though the information and sources in the online world most of the time are freely accessible, it is not always possible to use or share such information by the third parties without any permission from the original author.

That is the reason why rapid development of the global market has forced society to draw closer attention to protection of intellectual property rights, especially in activities involved with business development in e-commerce in order to avoid any legal consequences. Music, pictures, books, videos, designs all of that can be used as a subjects of e-commerce, where IP rights have huge impact and value. The correct understanding of the scope of persons rights concerning intellectual property for both – consumer and producer of the goods or services provided online helps to avoid misunderstanding, protects the right holders as well as eliminate illegal actions from both sides and avoid economic issues. Intellectual property law protects different types of innovative or creative products and it is necessary to understand the difference between them in order to obtain a correct and decent protection. The main condition for work to be protected under IP laws is its originality. Person cannot obtain a patent, trademark or register a design of already created and publicly available product or work. Personally, I am going to focus my research on analysing an impact of a developing digital environment and e-commerce on copyright protection or authors' rights in the terminology of continental European countries within the European Union. Also, the following aspects as businesses or people who are involved in online activity as, for instance, downloading of the content, concerning his or hers works in the field of arts, being specific - musical files, analysis of the possible ways of its protection, distribution and exceptions will be researched more narrowly. Moreover, in addition to the analysis on European legislative framework, Latvian national legislation or national approach in some aspects will be taken into consideration regarding downloading of a musical files. Use of the terms “music files”, “music works” or “music content” will be used in respect with the Section 4.4 of Chapter II of the Latvian Copyright

Law.¹ The research itself will be based on literature analysis as well as case law regarding this issue. Comparative analysis of different national approaches to the issues of music piracy will be examined as well.

Taking into account relevance of a chosen topic it could be said that I consider development of protection of the author's rights in a case of online sharing and distribution of musical works can be one of the most important and common aspects. Every author wants to be acknowledged, referenced as well as properly rewarded for his creature. Developed countries need both development of national creativity, and access to foreign works of artistic nature in order to share experiences and the show the progress. In this regard author's rights in general play an important role as it promotes in a decisive way achievement of these two purposes. As it has been already broadly discussed in legal literature copyright prevents from direct or indirect copying the whole or substantial parts of a work,² the expression of an idea not the idea itself. It is extremely hard, in some cases even impossible to prevent infringement or "borrowing" of an already existing piece of someone's creativity by making it extremely similar to original work. It gets even more complicated talking in a sense of online disclosure of an artistic or literature work. Identifying an infringer on the Internet or discovering an illegal use or distribution of an author's work might seem impossible due to several reasons. Following tendency raise a closer attention to problems concerning protection of any IP rights online. The main objective is to make sure that the use of such works is legally licensed and that the returns on use are maximised as possible.³

The Internet plays an important role in society's life as a convenient source of knowledge and entertainment. However, it is not common for people who are not engaged in any legal practice, to think that there always are legal rules to follow as well as scope for the use of information and content which we receive through the online network. As it has already been mentioned almost anything which is the outcome of the human intelligence and creativity can fall under the general rules of Intellectual property law and is protected according to appropriate norms. Will it be patent, copyright, trademark or design rights depends on a case and the work itself, sometimes even several types of an IP law can provide protection for different aspect of author's work. There are many aspect which may result difficulties in establishment of legal consequences for the online infringers. It is hard to establish straight away if the breach of a right occurred, who are the guilty parties or if there are legal grounds which allow a certain

¹ Latvian Copyright Law, *Chapter II, Protected and Non Protected Works, Section 4.4.*, Available on: <https://likumi.lv/ta/en/id/5138-copyright-law>, accessed 6 May, 2019

² T. Hart, S. Clark and L. Fazzani, *Intellectual Property Law*, 6th edition (UK: Palgrave Macmillan, 2013) p. 149

³ Cornish, D. Llewelyn and T. Aplin, *Intellectual Property: Patents Copyright, Trade Marks and Allied rights*, 9th edition (England: Thomson Reuters as Sweet&Maxwell, 2019) p. 1-006[8]

person to use particular information, product, its features or appearance. That is the reason why I strongly believe that it is highly important once again to outline the possible ways of protecting copyrights as important part of Intellectual property of an author in e-commerce, provide justifications to it and avoid the use of Internet in online business activity as a “law-free zone”. Nowadays copyright as well as Intellectual property as a whole is protected by the legislation the same way as material property does. For example, it is a fundamental rule that stealing or damaging someone’s property is a serious crime which follows with legal consequences regardless of the reasons behind the wrongdoing. The same can be addressed to copying of someone else’s outcome of the individuality, which should be the equivalent to the same extend as stealing. Out of this the following question can arise – why wrongdoings concerned Intellectual Property infringements specifically on Web platforms sometimes being underestimated and possibility to be a victim of online abuse is several times greater.

The number of violations of intellectual property of the rights holders, in particular copyright of an author on the internet has been showing a constant growth. It is connected with the fact that in competition it is much easier to copy already existed successful creations rather than to create and develop something completely new and unknown to consumers. There are plenty of example of how big companies copy each other ideas in order to raise demand for its production or making available to the public materials in such way that authors most likely can face acts of abusive nature. Overall, it could be said that in the Internet world it is obviously difficult to achieve the maximum observance of the copyright or IP rights in general and exclude all infringements once and for all, nevertheless the fact that the European legislation as well as legal norms all around the world paid closer attention to such problem already reflects great tendency and admits that problem existence. I consider the problem of protection of any businesses, private or public persons who is involved with Intellectual Property aspects, especially online extremely important since it became one of the biggest marketplace, where track of legal issues is more difficult, but not less important. Issues, for example, regarding illegal downloading of a content which is freely accessible online and further illegal usage or even distribution of it occur extremely often. Especially, in countries with highspeed Internet and low average income rates. Sometimes such cases happen without direct intention, sometimes it is purposeful activity with commercial objective. In both cases consequences can possibly lead to the civil or even criminal liability. In pursuance of a thesis development a brief general analysis of the protection of copyright and its common infringements in digital environment will be made which consequently will be followed by more narrow research of the issues with respect to downloading of files which content is musical works.

1. Specifics of protection of copyright online

In comparison with the other IP law protection methods, such as trade mark law or patent law, there is no need for any formalities in order to obtain a copyright protection. It comes into existence the moment copyrightable work has been developed,⁴ such principle firstly has been developed in Berne Convention⁵ which all the Members States of the European Union are signatory parties to. However, the author has limited time to enjoy such protection. In EU system where Copyright issues are regulated and governed by European Directives duration of such protection is estimated as lifetime of the author plus 70 years after his death.⁶ Nothing is different in a sense of obtaining a protection for publicised online work. If the work complies with all the necessary requirements which are going to be described further, then the work is protected under copyright laws the same way, for example, the printed book in a library does. Not to forget, that it is a myth that everything what is posted online or freely accessible can be easily copied or downloaded.

1.1 Legal requirements

Trade marks, patents, design, copyrights, there are different types of IP protection of a different aspects and parts of an outcome of person's creativity. Each of them has different requirements in order to obtain such protection. The answer to a question – what kind of works protect exclusively copyright I can underline the following aspects:

- The work must be original
- The work must be a creative outcome of author's effort and skills
- The work must be recorded in "material" or tangible form

First comes – originality. One of the main criteria for protection. The scope of the meaning of a term "Originality" might be extremely broad and can mean for each person something different, however, most legal sources describe such requirement as prohibition to copyright something that already exists or make a direct copy of it. Original work must be a outcome of skills and intellectual effort of a person.⁷ Next – creativity is another basic requirement for copyright protection which can be understood as a product which must have at least a minimal amount of creative "spark" and personalization from the author. As example of a material which

⁴ A. Kur, T.Dreier, *European Intellectual Property Law*,(UK: Edward Elgar Publishing, 2013) p.241

⁵ Berne Convention for Protection of Literary and Artistic works of September 9,1886 available on: <https://global.oup.com/booksites/content/9780198259466/15550001>, accessed April 2, 2019

⁶ A. Kur, T. Dreier, *supra* note 3.

⁷ U. Suthersanen, *Design Law in Europe*, (London:Sweet&Maxwell,2000), p. 119

could be considered to have complete lack of creativity and will be denied in obtaining a copyright could be a simple listing of ingredient in recipes or a set of phone numbers.

As I have already mentioned above, it is impossible to protect an ideas, principles or concepts itself. The result of author's creativity and intelligence must be expressed in some way or, for example, recorded. For instance, the script of a new novel must be written down to a paper, or a new melody or sound must be recorded to prove it "physical" existence. Copyrights will also not be involved in protection of functional or technical aspect of, for example, designs.⁸

These are basic requirements for an author to be protected under copyright in a case of regular protection of a work. In order to determine particular requirements concerning copyright of online distributed or shared work the needs concerning the corresponding technological measures must be specified.⁹ According to the Ian Walden and Julia Hörnle, material to be protected online from legal point of view requires to fulfill the following three aims:

- The creator of a protected material is authenticated
- The integrity of a material is guaranteed
- Unauthorized copying, transmission or further communication to the public is prevented if creator so wishes ¹⁰

Usually, exactly the last aim about prevention of unwanted further communication to the public of a downloaded musical work is a common type of infringement which will be covered in more details further in the research.

Online trade is becoming one of the most common type of business activity and often used market place where authors can get bigger recognition and cover greater audience with a purpose of larger income possibility. Obviously, decision to make author's creation publicly available implies greater risk and increases probability of wrongful use of such work, however interest in trading electronically is widespread. Protection of materials involved in online trading by the Intellectual Property rights, in turn, has its own requirements in addition to the ones already discussed above. Walden and Hornle describe them as follows:¹¹

- Access can be limited to a certain authorised persons
- Terms and conditions of a contract such as license can be recorded
- The material can be securely transmitted
- The receipt of the material can be adequately proved
- The creator can ensure an appropriate payment

⁸ Suthersanen, *supra* note 6, p. 118

⁹ I. Walden, J. Hörnle, *E-commerce Law and Practice in Europe*, (England: Woodhead Publishing Limited, 2001) chap. 2, p. 3

¹⁰ Walden, Hörnle, *supra* note 6

¹¹ Walden, Hörnle, *supra* note 6

Moreover, law establish certain exclusive rights for author to enjoy and leaves it up to an author to decide further terms and condition on which he wants his work to be used by third parties. Conditions can vary country to country as well as depend on what type of a work is going to be a subject of exploitation.

1.2 Different protection technologies

In the past copyright law has been broadly analysed in order to determine whether the existing provisions fully covered in the developed technological world. Without any doubt progress as well as development of the use of the Internet and e-commerce in general raised many question concerning changes of provision and possible further harmonization of certain new copyright aspects and the national legislation in the member states in order to strengthen the internal market within the EU and make the online world a safer place for author's to share their works. After finding several places where law concerning copyright issues has become less sufficient or has been lacking certain provisions, legislative bodies tried to adapt existing legal norms to the changes and still are in process of development of the new directive covering the gaps in the existing jurisdiction.¹²

Concerning applicable law, copyright is “firmly based on the principle of territoriality”.¹³ Such principle has been broadly analysed in legal literature, and referring to Lydia's Lundstedt comparative study dissertation where she describes such principle as follows:

*A basic premise of the territoriality principle of IP law is that each state determines whether and the extent to which IP rights exist and are protected within its own territorial borders.*¹⁴

Out of this certain issues has been arising. As an example of a conflict coming out of “principle of territoriality” was the question whether an author can impose his national legislature in another Member State in case if his work has been legally put onto the market in one State but further illegally distributed within the EU or even outside of it. Particularly, the following problem became relevant in respect to digital market. Illegal distribution of artistic and literary works has been and still remains extremely frequent infringements within the EU and specifics of it is that it is extremely difficult to discover where and when the wrongdoing took place in order to apply the necessary measures.

¹² Walden, Hörnle, *supra* note 6

¹³ Kur, Dreier, *supra* note 3, p. 243

¹⁴ Lydia Lundstedt, *Territoriality in Intellectual Property Law*, Stockholm University, 2016: p.1, accessed 7 April, 2019

Differences in legislature of different countries on the same subject matters till this moment make it difficult to resolve cases. That was a reason for the EU to attempt to harmonize and adapt to the differences in laws as fast as possible. Overall, there are eleven Directives and two Regulations regarding copyright legislation which Member States are obliged to reflect in national laws. Most of them represent the EU obligation under Berne and Rome Conventions, as well as under TRIPS Agreement and WIPO Copyright Treaty.¹⁵ For instance, Berne Convention is considered to be one of the main legislative power ruling the Copyright issues and has been aimed on harmonizing national and international laws into one common system. One of the main tasks of the Convention is an association of as many countries as possible with different legal traditions and different opportunities of protection of copyright. It is based on the principles national treatment and minimum rights which, basically, means that author of an artistic or literary work is granted with the same minimal amount of protection as in the other Member State, which is part of the Berne Convention.¹⁶ The following principles have helped to solve many issues concerning the cross-border activity of the works as well as made it equally advantageous for everyone. Further development of the European copyright system has been improved by formation of several harmonizing Directives, such as Computer Program Directive, Database Directive and Terms of Protection Directive, however, there are still exists major copyright issues which still remain unregulated.¹⁷ Examples of such could be issues regarding copyright contracts and moral rights as well as criterion of originality¹⁸ where harmonization is still needed. Taking into account issues regarding protection of copyright in e-commerce and any other aspect of related rights online those are expected to be more precisely described and harmonized in one of the most recent Directive which is still in process of formation and has not came into force yet - Directive on Copyright in the Digital Single Market, which is going to be one of the main legal framework governing functioning of the copyright in digital world. The benefits and an legal aim of the new coming directive has reasoned commissioner for Digital Economy and Society - Mariya Gabriel as follows:

*The long awaited Copyright Directive adoption is a crucial cornerstone for our Digital Single Market. By providing a clearer legal framework fit for the digital world, it will strengthen the cultural and creative sectors, and bring added value to the European citizens*¹⁹

¹⁵ The EU Copyright Legislation, available on <https://ec.europa.eu/digital-single-market/en/eu-copyright-legislation>, accessed 7 April, 2019

¹⁶ T. Dreier, B. Hugenholtz, Concise European Copyright Law (The Netherlands: Kluwer Law International, 2006), p.8, accessed 14 April, 2019

¹⁷ Kur, Dreier, *Supra* note 3., p. 315

¹⁸ *Ibid.*

¹⁹ European Commission, Press Release: *Digital Single Market: EU negotiations reach a breakthrough to modernize copyright rules*, Strasburg, 19 February, 2019, available on: http://europa.eu/rapid/press-release_IP-19-528_en.htm, accessed 9 April, 2019

It is expected to provide more benefits to online users and make a big well-known social platforms as YouTube or Instagram a safer place where “interests of the users are preserved through effective mechanisms” as well as will create a system providing a “wider access to knowledge by simplifying copyright rules in the areas of text and data mining for research and other purposes”²⁰ However, there also exist an opinion that the new Directive will negatively affect online services and portals since they will be obliged to share the income with the authors of works and mass media's editorial offices. A special controversy for several Member States caused provisions which obliged the online platforms, which provide an exchange of content, to be responsible for the content it is providing to the audience as well to conclude “fair license” agreements with the rightsholders.

2. Copyright Issues in the Distribution of Content on the Internet

The necessity of protection of the copyright itself is caused because of the improvement of the means of information exchange. In the past it has been way more difficult to access any kind of information since it existed either in a verbal form or in one or several written copies. Especial complexity represented the reproduction of such works. Due to technological development as well as expansion of the digital world as one of the biggest trading place, people got greater access to more information and works. Over the time reproduction of works of art became less expensive, fast and less labour-intensive process. Undoubtedly, all of this made the protection of copyright more complicated. Especially with the development of online trade also called e-commerce. The Internet became the best sources of information. Uniting in itself a set of computer networks, it created global information space with its own advantages and disadvantages to both – consumer and producers.

Being developed a little more than twenty years ago, the Internet obtained an audience about 2 billion people that makes almost a one-third of the population of the planet. At the same time the biggest advantages of the internet as a source of information became a serious obstacles for copyright protection. The more copies has been made, the more complicated it was to monitor their lawful use online in comparison with material or tangible forms of works and its distribution, where it is easier to control when the “copy” has been made and the turnover itself. For example, in case of an infringement a withdrawal of illegally made copies from market is the best solution. Regarding online sales or distribution of content in digital market, here everything is much more difficult. Once having a product displaced in online access, it is almost

²⁰ *Ibid.*

impossible to avoid risks. Author may not even know about the abuse of his works somewhere else in the world. It is not a secret that an unlawful use of protected works not only infringes the rights of the authors but also causes a loss of significant amount of money in a type of taxes, not paid profits or compensation because of violations in the field of protection of copyright and related rights and impacts the economic side of the Union.

Problems in protection of copyright on the Internet consist in complexity of ensuring evidential base in case of violation and in lack of the right mechanism in such protection. For protection of the authors rights can be used an advanced publication of works on papers before emergence on the Internet, the program technical means excluding free access and unauthorized copying, notarial assurance of manuscripts and other methods. In many national copyright legislature exist the provision that any copying of material without the knowledge of the right holder is illegal. However, it is obvious that loading of information on personal computers from the Internet cannot always come with the consent of the original author. Complexity and necessity in creation of common applicable laws and regulations on online activity also consists from development of combination of freedom of access to information and information security. Copyright protection issues in e-commerce, its observance and protection demands serious consideration and remains one of the most frequently discussed matter. Still an unambiguous and uniform norms for all EU community covering all aspect of copyright and related rights have not been developed yet. And there is no wonder, as the Internet as global computer network — rather new communication medium enduring a stage of rapid development. It is obvious that the legislation not always and not everywhere keeps up with the rapid improvement of new technologies and overall digitalization — thereof there is a set of tasks which are still in a stage of the final decision coming into force in the nearest time. What would be an outcome is hard to predict, however looking back and already seeing noticeable and valuable changes gives right to believe that future changes will be equality beneficial – to consumers and right holders.

3. Economic rationale for author's right in digital era

Before stating an economic rationale for copyright itself it is important to outline the two important aspects which differ works of artistic or literature nature in e-commerce from tangible goods in the market. So called works of creative and original nature such as books, musical

compositions and movies can be describes with two characteristics as non-rival and non-excludable.²¹ Those two characteristics are described as follows:

*They are non-rival, which means that they can be used by many persons at the same time without the individual value of consumption being reduced. They are also non-excludable, which means that without appropriate legal rights it is usually very difficult for the authors to prevent unauthorized uses of the content*²²

Generally speaking an economic rationale for copyright is that without proper system of protection people all around the world can “use” the already existing works of creative nature and financially benefit from it without any contribution to the process of developing such work. It is also has been established that without properly enforced applicable and harmonized laws investments in the artistic or literature industry will be discouraged and minimized²³ which obviously is going to affect community economy in general. The reason is that people, especially venture capitalists will not usually risk and get involved in activity with high possibility of “uncertain and potentially large damage”.²⁴ Nevertheless, uncertain, too strict and sometimes even unclear regulatory environment of the protection for copyrighted works creates even more concerns.

There exists different opinions on whether the greater protection and more strict rules concerning copyright are going to bring rather more advantages than disadvantages. From the one hand, excessive protection could possibly result “market power and thus higher access prices, which would reduce the extent to which creative works are disseminated”²⁵, also it might result difficulties in technological development and create certain “barriers to innovations”²⁶, from another hand making legislature concerning copyright too “loose” will create greater risks and more room for illegal usage. Out of this the less qualitative works are going to be produced since authors will not be encouraged to spend their time and efforts on something which will not be beneficial for them. Without any doubt the general protection of intellectual property, and copyright in particular, in some way imposes extra economic and social spending on the society,²⁷ however, besides that development of new technologies bring great number of benefits which in its turn “can meet resistance from incumbent intermediaries that control access to content”.²⁸ For example, “disruptive” or “riotous” technologies are especially often undergo control of its development through copyright. The necessity for legislators to find a

²¹ Copyright in the Digital Era: Country Studies, Chapter 5, 2015; Available on: <https://www.oecd.org/sti/ieconomy/Chapter5-KBC2-IP.pdf>, accessed 14 April, 2019

²² *Ibid.*

²³ *Ibid.*

²⁴ J. Griffin, Staff Attorney, Public Knowledge, *The Economic Impact of Copyright*, available on: <https://www.publicknowledge.org/files/TPP%20Econ%20Presentation.pdf>, accessed 12 April, 2019

²⁵ *Supra* note 21

²⁶ *Supra* note 24, p.3

²⁷ *Ibid.*

²⁸ *Ibid.*

middle way and balance between interests of a right holders and consumers is extremely important. The slight shift of advantage to one or another party will cause inconvenience and overall losses to both parties. For consumers in a way of restricted and limited content, for author's breach of exclusive right. Looking into the future perspective J. Griffin assumed that there is a chance that:

*Copyright can become a barrier to innovation because rights holders are given a monopolistic right, and as a result third parties are unable to use that content for future innovation without permission of the original rights holder*²⁹

Despite, it seems logical for right holders to have exclusive rights on possession and distribution of their contents, in some way it strictly limits the further development and improvement of already created content by some else, who wants to add "on top" their knowledge or experience bringing more value to already existing material.³⁰

As a matter of a fact, nowadays record labels and single musical artists are strongly battling and compete against free music providers who give access to free downloads of a copyrighted musical content. The reasoning is that these are the parties who are getting affected the most both from economic and moral perspective. Obviously, such activity not only constitutes an unlawful act and impacts an author or rightholder himself but also reduces profits of businesses involved in music industry and creates unfair competition in the market. Possible solution for this problem has been expressed as follows

*To compete effectively in this context, labels will need to price downloads in a way that recognizes the lower costs associated with providing music via the Internet*³¹

Consumers will spend money on product only if the real value can be derived from it as well as if their needs have been met.³² Taking into account this issues from the perspective of a Latvian user and Latvian economy, the following can be noted - the average level of wealth in Latvia is quite low in comparison to other European countries which means can purchasing power of the citizens is not very high. People are not tend to be positive about spending extra money on, for example, monthly musical app subscription or buying premium version of an free apps for extra options such as listening music offline after downloading it on their phone devices. In addition to that, Latvia is a country with one of the fastest internet speed in the Union which means that all operations which happen to occur in the digital space is extremely common for citizens and face large demand. Complex of comparably low purchasing power and income rate as well as highspeed internet service results desire of users to resort to unauthorized methods of obtaining desired product or service. Even though researches are

²⁹ *Ibid.*

³⁰ *Ibid.* p.2

³¹ M. Fox, *E-commerce Business Models for the Music Industry*, Available on:

https://www.researchgate.net/publication/233364949_E-commerce_Business_Models_for_the_Music_Industry, accessed 10 May, 2019

³² *Ibid.*

Copying of the content available on the internet is one of the most commonly met infringement. Illegal reproduction of copyrighted material can result civil and even criminal penalties if the wrongdoing has been established and defendant identified. However, identifying direct copying on the Internet is extremely difficult. Distribution, another fundamental right of an author which complements the reproduction right, make a right holder able share and make publicly available his original work to the society by selling, leasing, lending or renting his work.³⁷ Distribution is often used in order to gain material profit from sales of the creative work as well as to get public recognition. Illegal distribution can not only cause material losses to the right holder but also affect his moral rights.

Generally speaking there exists two types of copyright infringements - primary infringements and secondary infringement. Primary infringements happen when the prohibited acts are carried out without the permission of the original author and the action itself took place without intention, however the secondary infringement, the second type, is considered to be more serious and large-scaled, since it took place with constructive knowledge and intention to commit the restricted act, most of the time for commercial purposes.³⁸ Copyright law protect the original author of artistic or literature work from different types of infringements. Most common infringement of such right would be a direct copy or reproduction of visual and written works³⁹, however there are several other ways how infringers can abuse a possession of someone else's outcome of creativity, especially, if distribution is taking place not in physical manner. Taking into account specifically infringements in e-commerce, most common would be illegal distribution of copied works and usage of such work in personal favor without any permission from the authors. It is also known that "the Internet offers nearly limitless opportunities for easy copyright infringements"⁴⁰, because of difficulties for national and international legislations to "catch up" with the highspeed technological development, which creates "holes" and room for infringement opportunities.⁴¹ In order to avoid any illegal actions and following consequences an authorized user must get a permission for the use of the content as music, text, image or link.

Besides the common types of infringements mentioned earlier there are other issues coming from wrongful use of the accessible content online. For example, contractual issues and whether the contract being concluded online is going to be valid and are there enough evidence to prove

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³⁸ M. Van Hoorebeek, *Intellectual Property Nutshells*, 3rd edition, (England: Sweet&Maxwell,2009), p 89

³⁹ *Forms of Copyright Infringements* by Tom Streissguth, available on: <https://info.legalzoom.com/forms-copyright-infringement-23122.html> , accessed 12 April, 2019

⁴⁰ *Supra* note 17

⁴¹ B. Justin Jütte, *Reconstructing European Copyright Law for the Digital Single Market: Between Old Paradigm and Digital Challenges*, (Germany;2017),p. 51

it, since in some national jurisdictions it is an mandatory obligation for contract to be concluded in written form. Absence of physical existence of signed contracts can make the agreement invalid and distribution of such works will breach copyright. Next – defining an offence itself. As there are certain mandatory requirements for work to be considered as an object for copyright, there also exist certain criteria for an action to be classified as an offence. For example, if any of the exclusive rights enjoyed by the original author have been neglected or ignored, as direct copying, distribution, performing the work in public or translating a literary work to another language without permission, it would be considered as an direct offence. In case if one of the mentioned above actions took place with the correct referencing and not with commercial purposes it would be questionable if such action is a right infringement. Issues regarding money-laundering and regulations concerning payments online can be considered as a complementary concerns coming together with primary and secondary infringements as a result of wrongdoing. “Fair dealing” and “fair use” is also a question to be considered in case of online distribution and trade online, even though it is a principle which is mostly used and known in a common law jurisdiction as United States, Canada and Australia and is not common for European countries, however taking into account that online world does not have borders authors should be aware that in some jurisdiction so called “limited use of copyrighted work” is permissible without permission of an original author.⁴² As it has been already been mentioned, it is not easy to control public actions after putting a work for online sales. Disclosing any kind of information publicly will increase certain risks. Especially, when national legal norms differ country to country.

Nevertheless, for a long time strict rules for private use and distribution of the literary works online have been causing serious difficulties for online educational systems where both teachers and students rely on access and usage of electronically displaced information. Obviously, mentioned problem is not directly involved with e-commerce activity but it shows not less valuable “importance of limitations and exceptions to copyright for education and the importance of flexibility in those limitations and exceptions”.⁴³ Harmonized limitation and exception system has been expected to economically and socially encourage the use of works who’s original authors cannot be found or are unknown.⁴⁴ The recent Directive on copyright in Digital Single Market⁴⁵ which is still in process of developing and entering into force is

⁴² Copyright & Fair Use, Stanford University Library, available on: <https://fairuse.stanford.edu/overview/fair-use/what-is-fair-use/> , accessed 16 April, 2019

⁴³ *Supra* note 21, p. 7

⁴⁴ *Supra* note 21, p. 11

⁴⁵ Directive (EU) 2019/... of the European Parliament and of the Council on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, available on:

expected to clarify many aspect of copyright regulations which till this moment have been missing or have been lacking relevant provisions. In Article 5.1 of the same Directive has been established exceptions and limitation to some already existing provision concerning online education which are drafted:

...[i]n order to allow the digital use of works and other subject matter for the sole purpose of illustration for teaching, to the extent justified by the non-commercial purpose to be achieved⁴⁶

There also has been an opinion what limitations and exceptions for private non-commercial usage must be drafted more précised since current norms sometimes do not provide all the necessary grounds its correct application.

4.1 Copyright and music piracy issues

Nowadays, perhaps, one of the most global problems on the Internet and e-commerce is considered to be musical piracy issues that closely adjoins other types of copyright infringements. Piracy involves such action as disclosure of “database of musical files on websites, downloading files via Internet networks or filesharing via peer-to-peer networks.”⁴⁷ Illegal posting and distribution can be discovered of almost anything on the Internet: from music and pre-premier displays of movies before unpublished scientific works and confidential documents. First of all, the imperfect and not fully efficient legislation, both at the level of the world organizations, and at the national level of the certain countries is the reason of such phenomenon. Today the world community tries to develop in every way the effective mechanism which would help to simplify and accelerated a possibility to control protection of copyright on the Internet as well as its legal usage. At the same time, from my personal point of view, now the global nature of a problem of piracy is defined not so much by its geographical coverage but mostly of how many real consequences of its distribution and influence will affect European system of copyright protection and world’s economy in general. It is possible to say that distribution of online piracy issues creates situations capable to undermine the society’s stability in fields of law and economics.

The greatest distribution of audio and/or video "piracy" gained in the sphere of reproduction and distribution of soundtracks, musical files and audiovisual works. It is explained by improvement of the technological means which allow to carry out rewriting from the original

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2019-0231+0+DOC+XML+V0//EN> , accessed on 19 April, 2019

⁴⁶ *Ibid.*

⁴⁷ Available on:

https://www.researchgate.net/publication/228223919_The_Music_Industry_on_the_Line_Surviving_Music_Piracy_in_a_Digital_Era , accessed 9 May,2019

works the high-quality copies at home as well as because of high profitability of such activity. As for quality, one principle can be described here: the more time has passed after a release of a "licensed" or original work, the more qualitative the piracy version will be.

As a consequences of the Infringement of copyrights such as piracy it all turns into losses of thousands of workplaces, billions of not earned money and uncollected tax revenues. It also could be said that online "piracy" affects all of us. The end users, the software industries, original authors and also economy of the community countries and certain regions. Since the development of the Internet, online piracy increased in especially big scales. The concept of Internet piracy includes, in particular, use of global network for advertising and the publication of offers on sale, acquisition or distribution of illegal copies of original artistic and literature works as well as unauthorized downloading of the content.

The piracy is usually described as a copyright infringements with commercial purpose and it can be divided into several groups. It is impossible to unambiguously claim that such unpleasant phenomenon as internet piracy still exists in our society only because of the online "pirates" themselves. They motives are to give what people want to receive - "the same product, but for much cheaper price" and easy access to the material. The difference between ,for example, the price of a licensed disk and the piracy copy is huge, but money – has always been one of the main reasons for the copyright infringements cases. Most usually the internet piracy is referring to the wrongdoing concerning musical works and movies. Obviously, there also exists a moral and ethical aspect of the following question, however, material part of it plays huge role not only as a serious wrongdoing towards the author himself, but impacts an economy of the Union as well. The following situation can be imagined when a professional musician or producer has spent a lot of time and power on creation and development of the qualitative, unique and well sounding music or sound and someone in several minutes will download it and distribute all around the digital world as his own for commercial purposes. Theft in a pure form. Unfortunately, because of the rapid progress of the digital world it is extremely difficult to monitor such activity and prevent authors from being a victim of an unlawful users. Internet piracy as a term means a distribution of illegal copies of the content with the use of the Internet. Since the great impact and evolution of the Internet, especially commercial part of it, piracy just the same increased in especially big scales. The concept of Internet piracy also includes, in particular, use of the Internet for advertising and the publication of products for sale, acquisition or distribution of illegally obtained copies of software products. Shift in the demand for non-physical works has resulted increased tendency of piracy development. If in the past it has been relatively easy to control the circulation of pirated works and abuse of author's right, then nowadays the proper system for monitoring such activity is highly needed. Obviously, member

states fighting the extended piracy in all possible ways but harmful events still have reflect its impact. It could be said that

*...[t]he intangible nature of digital music has resulted in new consumption practices. Efforts to counter digital piracy have primarily used legal mechanisms to dismantle P2P networks and prosecute file sharers*⁴⁸

Nonetheless, such legal mechanisms, for instance as injunctions, are not always possible to apply as ways of controlling online piracy are not always described as a mandatory obligation. Within the European Union service providers, for example, are not obliged to impose any filtering systems or likewise act as “patrolling system”. One of the most famously-heard cases involving internet piracy and unauthorized downloading of the content from the website has been so-called the “The Pirate Bay Trial” case. The *Stichting Brein v Ziggo*⁴⁹ dispute has happened in the Netherlands, when anti-piracy organization filed a claim for an injunction against access provider Ziggo. Ziggo created an online sharing platform where have been stored copyrighted materials, for instance musical works, which could have been easily downloaded. After the claim has been revised by a national Supreme Court the following has been noted that “the permissibility of injunctions of this kind is dependent on the correct interpretation of Article 8(3) of the Directive 2001/29/EC”.⁵⁰ The article itself states that:

*Member States shall ensure that rightsholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.*⁵¹

National Supreme Court therefore questioned, whether the third party’s actions, in that case it was file-sharing website The Pirate Bay, can be qualified as a case of communication to the public or copyright infringement. However, the fact itself that the internet provider Ziggo had an option for its users to make such work publicly available constitute an infringement itself and must be dealt in accordance with legal norms.

⁴⁸ Available on:

<https://www.lse.ac.uk/media@lse/research/mediaworkingpapers/mscdissertationseries/2011/71.pdf> , accessed 8 May, 2019

⁴⁹ Case C- 610/15 Available on: <http://curia.europa.eu/juris/liste.jsf?td=ALL&language=en&jur=C,T,F&num=c-610-15> , accessed 1 May, 2019

⁵⁰ Kluwer Copyright Blog, *CJEU Decision on Ziggo: The Pirate Bay Communicates Works to the Public*, Available on: <http://copyrightblog.kluweriplaw.com/2017/06/30/cjeu-decision-ziggo-pirate-bay-communicates-works-public/> , accessed 1 May, 2019

⁵¹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society available on: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML> , accessed 1 May, 2019

4.2 Responses to the music piracy in some MS's national legislation

After describing the essence of “piracy” as one of the common and broad types of copyright infringements online as well as mentioning several types of it, it is reasonable to discuss several examples of how different Member States are “fighting back” such issues by adjusting its legal provisions and enforcing new legal mechanisms . As an example of the most “loyal” and at the same time most effective way of fighting against Internet piracy can be consider developed in France system during the 2009 called Hadopi Law. Hadopi Law was the draft of "three strike" system and was aimed on prevention of illegal downloads of movies and music in France. The systems worked the following way – as a first step a violator receives the first warning of imposition of sanctions through the e-mail and in case of the repeated violation the second step will be imposed which is a certified warning as an official statement about copyright infringement to the Internet user. The third and the last step will enter into force if the first and second steps warning have been ignored and repeatedly committed during the year after the second warning. An authorized agency searches for the offender and deals with the situation through legal measures according to the French laws.⁵² As far as I understood this system has been created with intention of giving an infringer a chance to understand all the seriousness of a wrongdoing and warning about possible consequences with a chance of future reconsideration of his actions. Aforesaid system successfully been tracking suspected French IP addresses and it has been established that after receiving a first warning - number of further repeated official statements has been more that 20 times less showing a great efficiency of adopted system.⁵³ Next example, the most tangled, but at the same time loyal in relation to Internet users is the anti-counterfeiting bill which has existed in the Netherlands till the year of 2014. Earlier in the Netherlands it was possible to download illegally distributed copyrighted music and movies from the online pages and do not face legal consequences only in case if the actions did not pursue commercial intentions. Local government for a period of time allowed citizens to download illegal copies of a music or movies for a private use. However, changes in Dutch legislation concerning copyright piracy have been made when European Court of Justice noted that not any kind of copying can be recognized as permissible and has been ruled by the court as followed:

⁵² The French Hadopi Law, available on: [https://www.hlmediacomms.com/files/2012/11/Europe - Copyright Infringement.pdf](https://www.hlmediacomms.com/files/2012/11/Europe_-_Copyright_Infringement.pdf) , accessed 27 April, 2019

⁵³ Available on: <https://www.bbc.com/news/technology-16391727> , accessed 12 May,2019

...[t]he Court holds that national legislation which makes no distinction between private copies made from lawful sources and those made from counterfeited or pirated sources cannot be tolerated⁵⁴

The Court came to the conclusion that a system which has been used in the Netherlands supporting possibility of free download of a content, such as music and movies, may be a reason for negative effects in the community internal market as well as creates an unfair disadvantage for the original author itself. The ruling on this subject matter also established that:

...[M]ember States which decide to introduce such an exception into their national law are required to provide for the payment of 'fair compensation' to copyright holders in order to compensate them adequately for the use of their protected works or other subject-matter⁵⁵

5. Downloading of a musical content as an author's right infringement

The question of legality of download of music, movies and other subjects of author's right from the Internet is a sensitive topic in many ways. Downloading, as well as unauthorized distribution or reproduction, represents a copyright infringement which consequently results civil and even criminal liability. Unfortunately, nowadays the number of existing "Torrenting programs"⁵⁶ which allow illegal acts to happen is considerably large as well as people who are not fully aware of the legal norms and scope of its application for the use of the publicly available content. Considerably often consumers underestimate all the possible risks. As example of a field of activity where music without copyright is demanded the most is famously known platform called YouTube. This is the most popular website supporting loading of different types of videos and at the same time providing with huge opportunities for obtaining commercial benefits as well as large spectator audience. As it most likely has been noticed that almost every online "creator" or "influencer" in their videos is not using famously known songs because of a risk to be accused on infringement of copyright. The reason for this is that the YouTube is also famous for its extremely strict policy for protection of copyrighted works, first of all – the used music. Almost everyone can agree that once in a lifetime has used YouTube in order to listen some songs and it is a very usual practice since one of the main task of such platform is to share and give access to the new musical performances in streaming regimes. Importantly, YouTube does not provide justifications and ability for its users to download musical material without permission from copyright holder and as it is almost 100%

⁵⁴ Court of Justice of European Union, press-release No 58/14, (Luxemburg: 10 April, 2014), available on: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2014-04/cp140058en.pdf>, accessed 27 April, 2019

⁵⁵ *Ibid.*

⁵⁶ Mostly known as a programs created by service providers which allow free download or online streaming of the copyrighted material, most of the time without original author's permission or any compensation for the use of the work. Torrents have a bad reputation for their use for illegal file-sharing

impossible to get personal permission from a big artists to download a music video from YouTube it makes it illegal to practice such activity. It has been clearly stated in Section 5.B of YouTube's "Terms of Service" as follow

*...[Y]ou shall not download any Content unless you see a "download" or similar link displayed by YouTube on the Service for that Content...*⁵⁷

That means that, from the law perspective, legal would be considered only online exploitation of a musical content as music videos via the website itself or special application. Download of a content from YouTube will still be unlawful even if the further modifications of a work as changing of a content, further distribution or personalization did not take place. Important to note, that YouTube does not receive any commercial benefit directly from the content it is putting on platform for users, because it would constitute a breach of author's right. Profits come from placing advertising before, after or in the middle of the actual video or depends on number of view on adds form different markets itself. Sadly, there happen to be developed many easy ways of how people still manage to do it using any type of existing software programs which are able to record and copy live streaming audio or video material.

Far not all websites, online platforms or service providers are so serious about the protection of author's rights. As a result, together with the development of the digital market, musical industry has been changed as well. Physical distribution of the tangible musical material slowly became no longer common for the society. E-commerce not only bring positive impact for musicians as being one of the easiest way for product distribution and possibility of greater recognition but also created many grounds for lawsuits against free music providers. Interests of an author often being violated also has been resulted

*... [i]n the light of the territorial nature of copyright and despite the existence of Directive 2001/29/EC, the situation in the field of collective management of copyright and related rights for online services is genuinely complex, owing mainly to the lack of European licenses.*⁵⁸

The "game changing" situation have happened when the first successful online music store has been launched by Apple in 2003. The essence of it has been described as follows:

*The launch in 2003 of Apple's iTunes Music Store initiated the development of legal online music stores allowing downloads on a pay-per-act basis. It also marked the entrance of technology companies into online music distribution and other creative content.*⁵⁹

⁵⁷ YouTube "Terms of Service", Section 5 "Your Use of Content", point B, available on: <https://www.youtube.com/static?gl=us&template=terms>, accessed 10 May, 2019 (In link information will be available in the language of a country the webpage has been opened through, English translation has been taken from the Blog article available on: <https://usingtechnologybetter.com/download-youtube-videos/>, accessed 10 may)

⁵⁸ Available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1557870816085&uri=CELEX:52008IP0462>, accessed 10 May, 2019

⁵⁹ Final study, *Licensing music works and transaction costs in Europe, Chapter 1.1. From online music stores to music in the cloud: The growth of the licensed offer*, Available on:

As the development in online environment showed its advantages for consumers, issues in respect with protection of economic and moral rights of an author on the other hand started to occur more frequently. Not all online platforms obtained legal permission on distribution and download of a musical content even though a great part of all copyrighted works have been uploaded for the purpose of easy access and free view. Issues arise then such access and possibility to download have been given without consent or acquired licensing right by any of the rightsholders - an author, performer or producer.

5.1 Legal basis

As a legal norm concerning the option for the download of the musical content it is a mandatory obligation for any Service Provider to receive a legal permission from the original rightholder. In Directive 2014/26/EU that obligation has been described as follows:

Providers of online services which make use of musical works, such as music services that allow consumers to download music or to listen to it in streaming mode, as well as other services providing access to films or games where music is an important element, must first obtain the right to use such works.⁶⁰

In same paragraph has been stated that Directive on the harmonization of certain aspects of copyright and related rights in the information society

...[r]equires that a licence be obtained for each of the rights in the online exploitation of musical works. In respect of authors, those rights are the exclusive right of reproduction and the exclusive right of communication to the public of musical works, which includes the right of making available.⁶¹

As it has been defined in the Directive in the online exploitation of a musical work for the Service Providers are considered the right of reproduction and the right of communication to the public as making a work available. From the perspective of a service user the possible rights of an author to be infringed or neglected are the rights for distribution and publication. In Latvian jurisdiction Intellectual Property issues are under the protection of the Constitution of Latvia, specifically under Section 15 of copyright law those rights are considered to be an exclusive economic rights of an author and in respect to Section 16 of the same legal norm, are possible to be transferred to third parties.

<http://www.keanet.eu/docs/music%20licensing%20and%20transaction%20costs%20-%20full.pdf> , accessed 6 May, 2019

⁶⁰ Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market , Para. 37 , available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0026> , accessed 6 May, 2019

⁶¹ *Ibid.*

In general, before making a download of a music from the internet possible certain steps have to be done and several parties have to participate in it. Usually, participants of a torrent usage can be divided into three groups:

- 1) the “end-users” whose primary intention is to download any material and as a consequent action could be file sharing; next
- 2) the torrent websites where the copyrighted materials are being viewed and downloaded from; and
- 3) an Internet Service Provider (ISP) itself which provides internet connection/access for both parties – end-users and torrent websites.

The wrongdoing concerning illegal download of a musical content as an infringement itself usually comes from the end-users who has been caught engaged in unauthorized activity concerning distribution or publication of copyrighted works after downloading it from the websites where such works has been stored. The solution for full ban and ending of expansion of operations with downloaded music without permission might be a complete blocking or shot down of torrent sites since no obligation are imposed on Internet Service providers.

“Online service providers often need to obtain multi-territory (“MT”) licenses in the aggregated EU repertoire.”⁶² By covering several territories there the musical works can be legally used, it reduces chances of violation and even though usually such licenses tend to be hard and costly to obtain, it provides consumers with greater choices of services and legal content and at the same time allow authors and right holders of musical work to enjoy all advantages of the Single Market.⁶³

5.2 Streaming as an online usage issues

Rapid development of the digital environment shifted purchasing of physical forms of musical works to the side. As a result increased interest and popularity of an streaming services downloads of a music as well as its online usage became a part of a daily life of the society in comparison to earlier years when limited availability of activity options on the internet played a role of a barrier for unlawful usage of musical content. Nowadays, possibility to legally purchase and/or download musical material online is one of the easiest options for the consumers. However, prevailing part of the users prefers and supports free access to desired

⁶² COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT Accompanying the document Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market Para. 13 Available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1557870816085&uri=CELEX:52012SC0204> , accessed 8 May, 2019

⁶³ *Ibid.*

content. Exist many types of paid and non-paid legal service providers who obtained an authorized permission and rights for distribution and commercial use in compliance with legal norms taking into account author's rights. Nevertheless, majority of the online users might not even know that by listening music online without downloading might also happen to be a type of author's right infringement.

It is highly important to outline and understand what the process of streaming actually means and what are the difference in comparison with the process of download in order to make any conclusions regarding its legality. After the download of any file to the person's computer or any other device from a website a full copy of that file would be saved onto the computer's "hard drive" and will be stored there.⁶⁴ It is not possible to use or fully view a file before the download is over. Using a streaming mode person can immediately enjoyed the desired contend and does not have to wait. The copy of the material used in streaming mode will not be permanently saved or copied directly to the device.⁶⁵ Because the downloaded file being stored on persons personal device it is afterwards very easily transmissible through emails or other websites, sometimes even resoled or personalized which result issues with respect to copyright protection. With streaming it is different. Those files are still being downloaded onto person's device, however, it is done "a little bit a time" and will be deleted soon after the stream session is over. Together with improvements in other technological spheres, different programs have been made aiming on recording and copying stream files.

Streaming is especially sensitive topic since the actual direct copy or illegal physical action as downloading is not taking place – the problem is in that because of the streaming service "the consumer is able to listen to music, but does not retain possession of it".⁶⁶ So, the end-user himself is not actually violating the author's rights, it is the streaming website who is the real perpetrator which makes it possible to listen or view copyrighted works in online regime as well as stores content in a server which constitute a breach of author's rights.

There exist specific Directive 2001/29/EC on harmonization of copyright and related rights in Information Society which governs issues on streaming services, particularly describing right of communication to the public of works and right of making available to the public other subject-matter in Article 3. Its objective is to provide efficient legal system to monitor activities in information society as Internet and establishes certain legal requirements for streaming services. From legal perspective application and interpretation of Article 3 is highly important

⁶⁴ Available on: <https://www.cloudflare.com/learning/performance/what-is-streaming/> , accessed 10 May, 2019

⁶⁵ *Ibid.*

⁶⁶ *Supra* note [43], p.5

for businesses which are engage with streaming services and the following cases reflects its applicability.⁶⁷

Even though download of a musical content is not a subject of the next important ruling it still includes important aspect of an issues concerning online streaming. In *ITV Broadcasting Ltd & 6 Ors v TV Catchup* case⁶⁸ has been established that online streaming service has to be considered as a “communication to the public” right within the meaning of Article 3(1) of Directive 2001/29⁶⁹ which is not considered to be a part of private use limitation and requires original author authorization in order to be able to provide such service. Article 3.1 of Directive 2001/29 grants an author the right of communication to the public as an exclusive on decisions in regard with authorization or prohibition on the use of their works be wire or wireless means.⁷⁰ The initial proceeding happened in the English Supreme Court after the TV Catchup, mostly known as TVC online platform provider which made available to their customers who help valid TV license online streaming of UK television broadcasts with no charge, happened to be a defendant against several UK commercial broadcasters who filed a claim on breach of an exclusive “communication to the public” right of their copyrighted materials.⁷¹ TVC in its defense has stated that the service they have been providing

...[e]nsures that those using its service can obtain access only to content which they are already legally entitled to watch in the United Kingdom by virtue of their television licence⁷²

An importance of the following case is that court in its ruling provided that Directive 2001/29 does not exhaustively defined the concept of “communication” as well as its scope of application and in the result established better understanding behind the terms “communication” and “public” as well as showed an importance for creators to be able to adjust and protect unauthorized use of their outcomes of creativity by new different business models in developing market place as e-commerce.⁷³

Moreover, talking about legality of streaming service in a sense of musical content can be mentioned on the biggest and often used musical platform on the Internet called Spotify. This app allows its customer to listen to any song they wish in stream mode on condition that the

⁶⁷ Available on: <https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1288&context=jbtl> , accessed 10 May, 2019

⁶⁸ Case C-607/11 *ITV Broadcasting Ltd & 6 Ors v TV Catchup* (TV Catchup) [2013]

⁶⁹ Available on: http://www.allenoverly.com/SiteCollectionDocuments/TV_Catchup_-_Streaming_is_Communication_to_the_Public_.PDF , accessed 10 May, 2019

⁷⁰ Art. 3.1 of the Directive 2001/29/EC *Supra* note [46]

⁷¹ *Supra* note 60

⁷² *Supra* note 59, para. 10

⁷³ *Supra* note 60

user is connected to the Internet. In its “user guidelines” the first mandatory principle sets the following mandatory obligations which prohibits

...[c]opying, redistributing, reproducing, “ripping”, recording, transferring, performing or displaying to the public, broadcasting, or making available to the public any part of the Spotify Service or the Content, or otherwise making any use of the Spotify Service or the Content which is not expressly permitted under the Agreements or applicable law or which otherwise infringes the intellectual property rights (such as copyright) in the Spotify Service or the Content or any part of it...

Next, a little bit different sphere where the use of copyrighted musical works can occur in a way of online streaming is education. Many schools, colleges and universities as a part of educational process often refer to visualisation of certain copyrighted materials which are available online. Important to note that not all such materials are treated the same way and have the same scope of possible use in education.⁷⁴ Certain Member States in their national legal framework have restrictions on use of copyrighted works by wire or wireless means for educational purposes and as example can be permission to use only “published works” which excludes possibility to use broadcastings and online streaming. Once again, limitations and exceptions still vary country to country. It also has been established that Universities all around the Union by using copyrighted works in their educational systems are contributing a lot to the economic side of the community as well as to the wealth of the society.⁷⁵

5.3 Borderline between private copying and communication to the public

An option for end-users to enjoy copying of copyrighted materials for “personal use” for a long time has been one of the main exception in regard with Intellectual Property protection. Due to certain changes such principle slowly comes to an end because of its double standards of bringing advantages and benefiting one party and at the same time disadvantages and harms the others. Issues regarding private use of Intellectual Property works has been a matter of discussions for a long period of time, especially in a sense of protection of digital content in online transaction. What is known as “private use” in European countries with civil law system can be compared to the principle of “fair use” which is common for U.S. and U.K. legislation. “Private use” and “Fair use” cannot be defined as the exact same principles, however, they do both provide certain set of limitation to protection of copyrighted works by describing situation

⁷⁴ Available on: https://www.communia-association.org/wp-content/uploads/2017/05/15casesin15countries_FinalReport.pdf , accessed 10 May, 2019

⁷⁵ Available on: <https://libereurope.eu/wp-content/uploads/2016/10/A-Basic-Guide-to-Limitations-and-Exceptions-in-EU-Copyright-Law-for-Libraries-Educational-and-Research-FINAL-ONLINE.pdf> , accessed 10 May, 2019

where its application can be legally justified.⁷⁶ Private use principle as a limitation for copyright protection nowadays is controlled and has been mentioned in the following legal sources – Berne Convention, Rome Convention, WIPO Copyright Treaty and the European Copyright Directive 2001/29/EC⁷⁷ and relates only to the right of reproduction.

Unlike The Berne Convention, where is a lack of separate Article on private use as it falls within the scope of the three-step rule,⁷⁸ under Rome Convention the private use as a separate exception and limitation is described in Article 15.1 as follows

Any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards:

*(a) private use;*⁷⁹

Directive 2001/29/EC the same way as the Rome Convention leaves it up to contracting Member State do decide an extent of the term “private use”. The concept of private use itself has the following conditions. First, private use of an downloaded musical work would be considered as justified only if such use has been done by private person with no intention for the commercial purpose.⁸⁰ It means that private use cannot reflect an activity which brings profits from it in any sense. Second, a system of fair compensation also called as levies should be provided to the author for the use of a copy and last – that such limitation is concerned with reproduction right and does not cover communication to the public.⁸¹ The question regarding extent of digital private use justification still remains questionable and might considerably vary in national legislation. As an example could be particular number of permitted copies to be made, amount of compensation or legal standing of levy system.⁸² Progress came with the development of “Peer to Peer network systems which allowed online users to download any accessible content. That was the moment when the issues of private use came into the light the most.

“Compensation to the author in the form of levies should be made by end-users who took advantage of the exception” as alternative it also possible for the author to claim a compensation from the service provider who made the copyrighted work available for others. System of levy

⁷⁶ F. Gondzinsy, M.C. Bottis, *Private Use as Fair Use: Is it fair?*, Available on: https://digitalcommons.sacredheart.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1019&context=computersci_fac , accessed 10 May, 2019

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ Directive 2001/29/EC, *Supra* note [46]

⁸⁰ *Supra* note 66

⁸¹ *Supra* note [55]., p.16

⁸² M. Kretschmer, *Private Copying and Fair Compensation: An empirical study of copyright levies in Europe*, October 2013, p. 6 Available on: https://www.wipo.int/mdocs/mdocs/en/wipo_ip_econ_ge_1_12/wipo_ip_econ_ge_1_12_ref_kretschmer , accessed 5 May, 2019

as a mechanisms for regulation of fair compensation is used by 22 members states.⁸³ Usually it is the matter for the Member State to decide who is going to be responsible for paying a compensation, however most importantly is to ensure that such action has been made and author's recognition for his work has been efficiently monitored and respected. If the compensation has been payed or a system of levy has been correctly used then the liability for the private exploitation of copyrighted work would not go further to the system of punishments. "In digital networks, the distinction between private and public spheres has become blurred."⁸⁴ Reasoning is that the problem is correlated with the issues of constant new service inventions as cloud services or P2P.⁸⁵ Mark Kretschmer in his research outlines

*It is important to note that the domain of the private is not co-extensive with the non-commercial. Some activities are pursued without monetary gain, yet addressed to a public audience. Some activities take place in the private sphere but may affect commercial exploitation.*⁸⁶

He draw attention to that private copying is not corresponding in extent of being not commercial. Nonetheless, *ACI et al. v Stichting de Thuiskopie* case⁸⁷ has established that amount of compensation and a levy system itself should differentiate in case of download of a copyrighted material from lawful or unlawful source.

6. Remedies in case of infringement and exceptions

Without any doubt, because of the rapid technological progress and increased interest towards online trade cases on illegal use of copyrighted materials showed rising tendency. That is the reason why one of the most important aspect is to have an appropriate and efficient remedy and judicial system in order to prosecute and adjudicate occurring infringements.⁸⁸ Sometimes it is difficult to impose serious remedies in cases concerned with violation of copyright because of the "likelihood of confusion".⁸⁹ That is the reason why it is often impossible to predict a certain outcome. Also common situation occurs when author over evaluates the extent of the wrongdoing and in the end claims are getting rejected. For a long time, enforcements measure have not been defined on international level and in that regards, fundamental changes for the

⁸³ *Ibid.* p.10

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.* p. 20

⁸⁷ C-435/12 *ACI et al. v Stichting de Thuiskopie* [2014] Available on: <http://curia.europa.eu/juris/liste.jsf?num=C-435/12> , accessed 13 May, 2019

⁸⁸ Kur, Dreier. *Supra* note 3, p 434

⁸⁹ *Ibid.*

first time took place in Part III of the TRIPS Agreement⁹⁰, which included a clear set of rules.⁹¹ The following agreement clearly defined all the necessary civil and administrative procedures as well as remedies and special requirements.⁹² As a result of a lack of relevant provision regarding damages and remedies the Directive⁹³ on common legal standards for enforcement of intellectual property rights has been made.

Furthermore, special relevance contained formation of the E-commerce Directive⁹⁴ in regard that it described certain legal provision concerning limited legal responsibility of the Internet Service Provider which is an important aspect in case of protection of copyright in e-commerce. Article 15 of the same Directive made it not mandatory for Internet Service Providers to control the content which is being transmitted or stored. The following Article addresses the issue as follows:

*Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.*⁹⁵

From the perspective of copyright protection system such article made it more difficult to pursue an effective enforcement of Intellectual Property Rights and nowadays is a subject to a new Directive which has already been mentioned earlier in this paper. An example of how Article 15 led to a situation where necessary measures for protection of copyrights have not been applied because of the possibility to breach some other fundamental rights which has resulted a unauthorized usage of protected works can be seen in a *Scarlet Extended SA v. SABAM* case. In the mentioned case the wrongdoing occurred when Belgian management company which represented different authors and composers of a musical works filled a claim against one of the internet service providers called “Scarlet”, which offered to their clients Internet service without providing and offering downloading service and file sharing options. All of this resulted Scarlet’s internet users to download copyrighted by “SABAM” content without authorization through peer-to-peer software system.⁹⁶ The court held that the copyright infringement took place and:

⁹⁰ Part III of TRIPS Agreement on Enforcement Measure, available on: https://www.wipo.int/edocs/mdocs/aspac/en/wipo_ipr_jkt_11/wipo_ipr_jkt_11_ref_t6.pdf, accessed 22 April, 2019

⁹¹ *Ibid.*, p.437

⁹² *Ibid.*

⁹³ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004L0048R%2801%29>, accessed 30 April, 2019

⁹⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market Available on: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32000L0031>, accessed 30 April, 2019

⁹⁵ *Ibid.*, Article 15.1

⁹⁶ *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, Case C-70/10[2011], Available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62010CJ0070>, accessed 30 April, 2019

By judgment of 29 June 2007, the President of the Tribunal de première instance, Brussels, accordingly ordered Scarlet to bring to an end the copyright infringements established in the judgment of 26 November 2004 by making it impossible for its customers to send or receive in any way files containing a musical work in SABAM's repertoire by means of peer-to-peer software, on pain of a periodic penalty.⁹⁷

However, Scarlet appealed to that decision claiming that by imposing any kind of filtering systems or injunctions into such process would be contrary to the existing laws as well as:

...[t]ransposes Article 15 of Directive 2000/31 into national law, because it would impose on Scarlet, de facto, a general obligation to monitor communications on its network, inasmuch as any system for blocking or filtering peer-to-peer traffic would necessarily require general surveillance of all the communications passing through its network.⁹⁸

Court's final decision stated that any kind of injunction against Scarlet as imposing filtering or blocking systems for its customers would be contrary to the existing EU Directives and would cause a breach of fundamental rights, such as freedom of expression and personal data protection. Such decision represented the willingness of the EU to underline the importance of keeping an Internet as a neutral place where fundamental rights are taken into the first place. Continuing topic of exceptions and situation where remedies may not be imposed in case of violation could be mentioned the following circumstances. Generally speaking, because of the lack of one common system regulating the copyright protection some of the exceptions can vary country to country and are not compulsory to the whole territory of the Union. It is important to underline the three step test which as the result has been included in Article 13 of the TRIPS Agreement as legal basis for limitation and exceptions:

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.⁹⁹

The following Article stated that sometimes the scope of limitations and exception might be unclear and it is up to the national legislation to decide whether certain circumstances will be serious enough for imposing any remedies.

Next, exception and limitation is a case of private copying, which is also closely linked with download of a music, by a natural person without commercial intentions and for such exception not to be contrary to the fundamental rights of an author for reproduction of his work a further paid "fair compensation" through a system of levies must be made to the rightsholder. Basis for such exception can found in Article 5.2(b) of Information Society Directive 2001/29/EC:

...[i]n respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned¹⁰⁰

⁹⁷ *Ibid.*, [para. 23]

⁹⁸ *Ibid.*, [para. 25]

⁹⁹ TRIPS Agreement, Article 13 Available on:

https://www.wto.org/english/res_e/publications_e/ai17_e/trips_art13_jur.pdf, accessed 1 May, 2019

¹⁰⁰ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Article 5.2(b), available on:

Must be mention that the following exception gives grounds for possible legal reproduction of the copyrighted work for personal use and does not permits any kind of further distribution neither online or in tangible form.

Liability and consequences for an infringement depends on which party committed the wrongdoing, what was the intention and which purposes the violator has perused. Next, the form of remedies is contingent on the level and extent of a wrongdoing. Unauthorized download of a musical material and consequent distribution of it can result criminal proceeding in almost every European Country starting with fines and ending with long-term imprisonment. In Latvia the most serious consequence would result

...[d]eprivation of liberty for a period of up to six years, with deprivation of the right to engage in specific employment for a period of up to five years and with or without probationary supervision for a period of up to three years.¹⁰¹

Obviously the extent of the punishment in European Countries varies depending on its seriousness and impact as well as the legal norms in general. For example, maximum possible duration of imprisonment in France would be sever years, whereas in Germany in would only be not more than three.

As an example of national resolution of infringement concerning illegal download and distribution of a copyrighted musical work which in the result has led to criminal proceeding occurred in a Latvian case which happened in 2009 when two private persons, whose full names have not been disclosed in a case ruling, E.V. and L.K. being a representative of a certain company named “Z” have made a webpage where reproduced and put to the free public access several copyrighted literary and musical works.¹⁰² E.V. and L.K. have been accused with respect to unlawful use of copyrighted work online. Before the claim against them have been filed, E.V. and L.K. have misunderstood legal norms regarding legal obligation on use of copyrighted works and with prior information to the right holder that such actions would be considered as lawful intentionally placed materials on their webpage without permission from original author as well as without paying any compensation. The works which have been placed on the defendants website have been easily accessible to anyone who have registered and authorized to the site without the need for any extra payments. In Latvian Law criminal liability

<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML> , accessed 1 May, 2019

¹⁰¹ Legal Acts of the Republic of Latvia, The Criminal law, Chapter XIV, Article 148.3 Available on: <https://likumi.lv/ta/en/en/id/88966> , accessed 13 May, 2019

¹⁰² Judgment of the Supreme Court of the Republic of Latvia of 16 February 2015 in Criminal case No SKK-0008-15 (11816010009) (annulment of the judgments of courts of both lower instances and termination of the criminal case) Available only in Latvian on: <https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi> - under case number 11816010009 , accessed 13 May, 2019

of copyright infringements is regulated by Article 148 of Latvian Criminal Law¹⁰³ which was the ground considering both E.V. and L.K. guilty. The following article's point two states that

*For a person who commits the criminal offence provided for in Paragraph one of this Section, if it has been committed by a group of persons according to a prior agreement, the applicable punishment is the deprivation of liberty for a period of up to four years or temporary deprivation of liberty, or community service, or a fine.*¹⁰⁴

As for the future perspective the new legal framework is soon coming into force regarding copyrighted works in e-commerce and other aspect which are closely linked with digital environment. Certain section are expected to have noticeable changes of legal norms for downloading, online streaming as well as filesharing activity which will possibly strengthen the already existing system.

¹⁰³ *Supra* note 89. Article 148

¹⁰⁴ *Ibid.* Article 148.2

Conclusion

Over the years European Union not only developed as a community but also grown into a membership of twenty eight countries.¹⁰⁵ As a general rule, which is not, however, estimated as explicit in the Treaties, community laws have supremacy over the national legislation.¹⁰⁶ “It clear that copyright law has been subject to enormous change in recent years and that there will be further changes.”¹⁰⁷ New Directives are already on its way of formation with several noticeable changes for existing legal norms. Efforts of the European Union on rapprochement of the national legislation of the community states in the field of copyright not only promote expansion of domestic market, but also creates easiest way of protection of copyright and related rights which are still based on the principles of the Berne Convention, but represents higher level of legal protection of literary and artistic property. Harmonization of legal standards of copyright is a solution for creation of the tendency of contribution to the development of creative potential of the society as well as strengthens the European unity in the humanitarian sphere and promotes formation of the European identity even in larger scales. Furthermore, even though the harmonization process has been made in a field of economic rights of an author, where the common norms have been defined in order to keep the internal market functioning the right way, the moral right protection in the Union territory still remains in the need for united regulatory system. Justification for the common need and future perspective of harmonized system has been mentioned in paragraph 4 of Directive 2001/29/EC as follows

*“A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation (...) and lead in turn to growth and increased competitiveness of European industry (...)”.*¹⁰⁸

Legal regulation of author's rights as well as its related rights in the European Union are aimed at providing a high level of protection for these rights as they represent a legal basis for protection of the results of the overall creative activity in the Union. Intellectual property rights in general can be considered as one of the most valuable assets of a business. That is the reason why any business involved or which is planning to get involved with trading and distribution of its production in online world must be seriously concerned about to what extend and which rights such business enjoys, what is the scope of it rights and whether or not such rights are legally protected. Otherwise, can be said that getting into e-commerce activity people must be aware of consequences of wrongly used information. A reasonable conclusion after a made

¹⁰⁵ <https://www.ivir.nl/publicaties/download/967.pdf> , accessed 21 April,2019

¹⁰⁶ *Ibid.*

¹⁰⁷ V. Schöfisch, Harmonization of Copyrights and Related Rights in the European Union, 13 July, 1998 (???)

¹⁰⁸ Directive 2001/29/EC *Supra* note [46]

research would be that the Intellectual Property in general must try to adapt to changes faster, especially when it is dealing with such a highspeed developing segment as digital world and e-commerce as well as pay closer attention to development of a common and harmonized regulatory system in the community since the “gaps” and differences between national jurisdiction sometimes makes it difficult to solve cases. Referring to Ian Hargreaves:

*Intellectual Property Rights support growth by promoting innovation through the offer of a temporary monopoly to creators and inventors. But such rights can also stifle growth where transaction costs are high or rights are fragmented in a way that makes them hard to access.*¹⁰⁹

It has been noticed that “advanced economies tend to shift their focus from physical items to intangible assets”.¹¹⁰ That is the reason why online market is now developing as a common place for trade and business negotiations. The international conventions are necessary for development of the unified norms providing stability and law and order in the field of the public relations as well as economic and social wealth. The Union has already reflected its capacity to harmonize existing legal frameworks by interpretation principle.

*While the internet knows no borders, the online market for music services in the Union is still fragmented, and a digital single market has not yet been fully achieved.*¹¹¹

Development of a digital world and the demand for media sources consumption is still happen to be faster than the adaptation of the existing regulations and legal norms to it, in order to cover all the necessary “gaps”. Fragmentation of an online market has also been seen as a possible solution to minimize violation. Unfortunately, till today litigation still fails to fully stop unlawful downloads of musical works and continues to appear not as efficient as it is needed to be. It is caused not only because of the specifics of virtual space with its global character and cosmic speeds of exchange of information, but also with firmly developed habit of consumers for easy access to any necessary information that sooner or later inevitably leads to violation of the rights of their lawful owners. Making a conclusions regarding question on common issues of download of a musical content could be said that there still exists various examples of how author’s right can be violated. The obvious correlation between development of the digital environment and increased frequency of cases on copyright abuse providing that unlawful download of a musical works remains one of the most commonly infringed type of Intellectual Property has been seen through the research development. Live streaming and personal use exception are just an example of possible ways how copyright can be affected. Together with the digitalization and improvement of e-commerce influence on the society became matter of an increasing tendency for obtaining “what is easy to get for better price”, especially in a

¹⁰⁹ Ian Hargreaves, *Digital Opportunity: A review of Intellectual Property and Growth*, available on: <https://sub.byresources.com/freedownloads/HargreavesReport.pdf> , accessed 20 April,2019

¹¹⁰ *Supra* note 17, p. 221

¹¹¹ *Supra* note 48., para. [38]

courtiers with comparably low rates on income. It once again reflects a prevailing negative impact of an e-commerce on copyright protection system.

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